

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN A. DALEY

VS.

C.A. NO. 02-2629

GRANADA US PRODUCTIONS, ET AL.

MEMORANDUM OPINION AND ORDER

WEINER, J.

JANUARY 29, 2003

The plaintiff brought this copyright infringement action, claiming the defendants released a television and video production entitled Princess of Thieves which plaintiff contends infringes on his copyrighted musical play, sHerwood. Presently before the court is the motion of the defendants for judgment on the pleadings. Since resolution of the motion requires us to examine documents outside the pleadings, we will convert the motion to a motion for summary judgment and enter judgment in favor of the defendants and against the plaintiff.

Defendants' motion is based solely on the threshold issue of whether the copyrightable elements of the two works are so substantially similar that plaintiff may proceed with a copyright infringement action.¹ The Court can decide this issue as a matter of law by viewing the two works. The Court has viewed the two works, read all the submissions by the parties and reviewed the parties' expert reports. We conclude that the copyrightable elements of

¹Defendants do not dispute that plaintiff filed a copyright for his work, originally titled Sherwood Knights and described as a musical play on July 29, 1991 and subsequently filed additional copyrights covering songs and scripts with the latest filing on August 29, 1997.

the two works are not substantially similar.

Summary judgment is appropriate in a case where the issue is whether two works are substantially similar if “no reasonable juror could find substantial similarity of ideas and expression[,]” viewing the evidence in the light most favorable to the non-moving party. Shaw v. Lindheim, 919 F. 2d 1353, 1355 (9th Cir. 1990).

Because direct evidence of copying is seldom available, a claimant may prove copying circumstantially by showing both that the two works at issue are substantially similar and that the allegedly infringing party had access to the allegedly infringed work.² Whelan Associates v. Jaslow Dental Lab, 797 F.2d 1222, 1231 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987). Substantial similarity is premised upon two findings. First, there must be sufficient similarity between the two works at issue to conclude that the alleged infringer used the copyrighted work in producing the allegedly infringing work. See Whelan Assocs., 797 F.2d at 1232. This test, known as the extrinsic test, focuses on the objective similarities in specific expressive elements, such as plot, themes, dialogue, mood, settings, pace and sequence of events in the two works. Kouf v. Walt Disney Pictures and Television, 16 F.3d 1042, 1045 (9th Cir. 1994). With regard to the first finding, the trier of fact may be aided by expert testimony. Second, there must be sufficient intrinsic similarity for an ordinary lay observer to conclude that there has been an unlawful appropriation. Id. Because we find that plaintiff has not raised a triable issue of fact under the extrinsic test, we will grant summary judgment in favor of the defendants.

2. For purposes of the motion for summary judgment only, defendants do not contest the issue of access. However, this admission of access is a factor to be considered in favor of plaintiff. Shaw v. Lindheim, 919 F.2d 1353, 1362 (9th Cir. 1990); Sid and Marty Krofft Television Prods. Inc. v. McDonald's Corp., 562 F. 2d 1157, 1172 (9th Cir. 1977).

General plot ideas and themes lie in the public domain and are not protected by copyright law. Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984). In addition, all situations and incidents which flow naturally from a basic plot premise, known as scenes a faire, are also not entitled to copyright protection. Berkic v. Crichton, 761 F.2d 1289, 1293 (9th Cir. 1985). Copyright law protects a writer's expression of ideas, not the ideas themselves. Feist Publications v. Rural Tel. Serv. Co., 499 U.S. 340, 345-51 (1991); Shaw v. Lindheim, 919 F.2d 1353, 1356 (9th Cir. 1990).

There is no doubt that the two works do share many of the same characters, as well as a similar setting and certain common action sequences. However, this sharing of common features is only natural since both works are derived from the Robin Hood legend which has long ago been part of the public domain and which has been the subject of numerous movies, television shows and comic books. Thus, both works may properly contain scenes of archery tournaments, sword fighting, Nottingham Castle, Sherwood Forest, appearances by Robin Hood, his Merry Men, the evil Sheriff of Nottingham and the tyrannical Prince John and such themes as Prince John trying to displace his brother, King Richard, the capture of Robin Hood by evil forces and his release by the forces of good. .

However, a simple viewing of the two works reveals that they are entirely different with respect to plot, themes, sequence of events, mood and setting. sHerwood is a musical play with comic overtones. The vast majority of the story is told through song and dance.

The play finds the evil Prince John trying to take control of the throne from his brother, King Richard. After Prince John imprisons King Richard, Robin Hood's ex-wife, Maid

Marian, seeks out Robin Hood to persuade him to help King Richard. Margaret, a witch, agrees to help Prince John by killing Robin Hood to prevent him from saving King Richard. In exchange, Prince John agrees to obtain for Margaret the magic Sands of Time which will give her eternal youth and power.

Robin Hood's teenage daughter, Robyn, is living with her mother in Nottingham Castle. She does not want to pursue the traditional feminine role of her mother. Robyn has fallen in love with Junior, one of Robin Hood's Merry Men from whom she conceals her relationship to Robin Hood. Robyn decides to join her father and the Merry Men in Sherwood Forest by disguising herself in her father's old clothes. Her identity is revealed almost immediately when her hat comes off while celebrating her defeat of Junior in an archery contest. Because he fears for her safety, Robin hood rejects Robyn's plea to live in Sherwood Forest.

Meanwhile, Margaret the witch lures Robin Hood into a cave where she and her vixens kill him through supernatural forces. After informing Robyn of her father's death, Junior assuages Robyn's desire to be the equal of men by telling her that in his view, women are the stronger sex. He also tries to persuade Robyn to accompany him to save King Richard. After overhearing Margaret describe how she killed Robin Hood, Robyn declines Junior's offer, stating she must avenge the death of her father. Junior is subsequently killed by Prince John in a sword fight at Nottingham Castle. Robyn goes to Margaret's shack where she steals the Sands of Time. Robyn then uses the magic powers of the Sands of Time to bring Robin Hood and Junior back to life. Alive once again, Robin Hood immediately slits Margaret's throat. Robyn then sprinkles the Sands of Time on Margaret's wound which automatically kills her. Robin Hood, Junior and Robyn then go off to Nottingham castle where Robyn puts a sack over Prince John's head, King

Richard is saved and the Merry Men prevail. Robin Hood remarks how he underestimated his daughter and that he could not have saved King Richard without her help. Robin Hood then retires to a castle with Marian while their daughter Robyn joins Junior in Sherwood Forest.

Princess of Thieves, on the other hand, is a made for television adventure movie. which does not contain any singing and dancing. The movie finds an aging Robin Hood facing a crisis when he and Will Scarlett return from battle and announce that King Richard is dying from wounds sustained in the crusades. King Richard's evil brother, Prince John, has been in charge of England since the departure of King Richard. Robin Hood realizes that Prince John will want to kill Richard's illegitimate son, Prince Phillip, so that he can assume the throne. Therefore, Robin Hood decides that he and Will must escort Prince Phillip from France to England in safety so that Prince Philip can ascend to the throne.

Meanwhile Robin Hood's daughter, Gwyn, is a spirited, idealistic young woman who has largely been ignored by her father because of her gender. Desperate to impress her father, Gwyn pleads with Robin to allow her to accompany him to escort Prince Phillip. Robin Hood is adamant that such a mission is far too dangerous for a woman and sets out the next day, leaving Gwyn behind. Gwyn is so frustrated that she cuts her hair and dresses like a boy. However, before they can escort Prince Phillip, Robin and Will are captured by the Sheriff of Nottingham and taken to London. Gwyn sees this as a perfect opportunity to impress her father, but she must disguise herself as a young man in order to ride with the Merry Men. Eventually, Gwyn uses her archery prowess and bravery to safely escort Prince Phillip to England and to save her father's life just as he is about to be shot at close range by the Sheriff of Nottingham. At the same time she convinces Prince Phillip, who would rather lead a simple life, to accept his role as

King of England by pointing out how terribly the people have been treated under Prince John's reign. Though Gwyn and Philip acknowledge their love for each other, they are unable to marry since Philip becomes king and Gwyn is still a commoner. By the end of the film Robin Hood acknowledges that Gwyn is his equal and invites her to join him as his partner in service to King Phillip.

In addition, many of the characters derived from the Robin Hood legend are portrayed differently in the two works. For example in sHerwood, Robin Hood is actually killed by a witch through supernatural forces, and then brought back to life by Robyn also through supernatural forces, while in Princess, Robin Hood, although imprisoned and tortured, is never actually killed and is ultimately freed and saved by Gwyn's bravery and archery prowess.

The Sheriff of Nottingham appears only briefly in the beginning of sHerwood, but is the principal villain in Princess, having frequent battles with Robin Hood, Gwyn and Philip. Maid Marian appears throughout sHerwood, singing and dancing and being reunited with Robin Hood at the end. By contrast, Maid Marian does not even appear in Princess, having died before the story begins. King Richard the Lionheart appears throughout sHerwood, even claiming his right to the throne at the climax of the second act. King Richard never even appears in Princess having been only referred to as dead or in the process of dying.

In addition, there are many characters which are unique to each work. For example, in sHerwood, one of the central characters is Margaret the witch who, along with her vixens, kill Robin Hood through supernatural forces in order to obtain the Sands of Time, which Robyn ultimately steals from Margaret in order to bring Robin Hood and Junior back to life. There is no character that is similar to or even resembles Margaret in Princess of Thieves.

Another character who appears in sHerwood but not in Princess of Thieves is Junior. Junior lives in Sherwood Forest as one of the Merry Men. His only role in sHerwood is as the romantic interest of Robyn and his character does not develop as the story progresses. At the end of sHerwood, Junior and Robyn have a romantic relationship. The only character even remotely similar in Princess of Thieves is Prince Philip who is the rightful heir to the throne. Philip, unlike Junior, is forced to conceal his identity through much of the film because his life is in danger. The character of Prince Philip evolves throughout the story as Gwyn is able to change his personality from that of a selfish, spoiled individual to that of a leader who cares for his countrymen.

Plaintiff claims that his infringement claim is based “on the specific, unique and original expression of the idea of the daughter of Robin Hood, which is developed in detail in Plaintiff’s work and substantially copied by Defendants.” Plaintiff’s Opposition at 5, n.9. Specifically, plaintiff contends that both works 1) focus on the father-daughter conflict in which Robin Hood’s daughter is desperate to prove herself to her father who at first refuses to accept his daughter as his equal but who in the end recognizes her skills and character and 2) contain a romantic interest involving Robin Hood’s daughter.

Of course, the idea of a fictional daughter of Robin Hood, who embodies the characteristics of Robin Hood and who proves herself the equal of men and who falls in love did not originate with plaintiff. In the 1959 film, Son of Robin Hood, which the court has also viewed, the “son” is actually Robin Hood’s daughter, “Deering Hood”, who also must dress like a boy in order to prove she is the equal of men. Deering Hood also opposes an unjust ruler, Duke Simon des Roches. Deering Hood also possesses many of the characteristics of her father

including her skill with a bow and arrow which she uses to defeat the enemy in several scenes. This film has been the subject of a registered copyright since 1959. See Exhibit B to Defendants Reply Brief.

Second, the themes of a young woman trying to prove herself to her father who ultimately acknowledges her as his equal and falling in love are scenes a faire, or standard to any story of a young woman coming of age.

Third, even if the idea of a fictional daughter of Robin Hood falling in love while proving herself to her father and to other men could somehow be viewed as original and unique enough to be copyrighted, we find after viewing the two works that each expresses such a character in entirely distinctive manners, including the manner in which the plot is told, each daughter's motivation and each daughter's relationship to other characters in each story.

In sHerwood, Robyn has been raised in relative luxury primarily by her mother, Maid Marian, in Nottingham Castle. As a teenager, Robyn decides to rebel against her mother's traditional feminine lifestyle and dependence on men. Her primary motivation is to do something with her life and marry a man who will treat her as his equal. Robyn does not speak of having a conflict with her father or of wanting to impress him. She also does not display any social or political motivation. In order to prove herself the equal of men, she decides to disguise herself in her father's old clothes and hat and seek adventure with her father's band of Merry Men. Her passion to prove herself the equal of men begins to fade, however, when Junior tells her that he views women as the "stronger" sex, and makes reference to the emotional strength of his grandmother.

In Princess of Thieves, Gwyn has been raised in a humble lifestyle at the Abbey

by Friar Tuck. Her mother, Maid Marian, is already dead and Gwyn has had little contact with her father. She has befriended Froderick, a scholar in the Abbey who does not appear at all in sHerwood. Angered by her father's indifference to her and refusal to acknowledge her skills, she leaves the Abbey dressed as a boy. She also is socially and politically motivated to liberate the people of England from the tyrannical rule of Prince John.

In sHerwood, Robyn is in love from the start with a character named Junior, who we are told is the son of Little John, a friend of Robin Hood. In Princess, Gwyn sees Froderick as more of a brother and is actually in love with Prince Philip who does not appear at all in sHerwood. In Princess, there is somewhat of a love triangle as both Froderick and Prince Philip are in love with Gwyn, but Gwyn can only love Prince Phillip.

In sHerwood, Robin interacts and sings with her mother Marian, who does not appear at all in Princess.

In sHerwood, Robyn's rescue of her father is expressed through supernatural forces. She steals the Sands of Time from Margaret and then assists her father in killing her by sprinkling them on Margaret's wound. In the ultimate scene, she merely places a sack over Prince John's head. Robyn's archery prowess is only seen in one scene where she impresses the Merry Men by defeating Junior in a contest by knocking over a sapling. Her prowess has no impact on and plays no role in the outcome of the story itself.

On the contrary, Gwyn's rescue of her father in Princess is expressed in a natural and historical fashion based on the Robin Hood legend. There are no supernatural scenes in Princess. Moreover, Gwyn's archery skills play a much more prominent role. She wins a contest by splitting the Sheriff's arrow thereby gaining entry to the castle where her father is being held

captive. During a battle scene, she saves Philip by shooting a guard in the hand. Finally, during the ultimate battle scene, she shoots down the Sheriff's arrow as it is heading straight for Robin Hood, thus saving her father's life.

Similarly, the only act of kindness to the poor that Robyn undertakes in sHerwood is to give a poor woman her scarf. The only purpose behind this act is to impress Junior. In Princess of Thieves, on the other hand, Gwyn intercedes on behalf of a young boy accused of stealing in a marketplace. To distract the merchant and his wealthy customer, Gwyn steals a bag of venison pies and gives them to some poor children. Gwyn uses this incident to make a political statement to Froderick about Prince John's cruelty and injustice. Indeed, one of Gwyn's primary motivations in Princess is to liberate the people of England from the tyrannical rule of Prince John. Robyn is not socially conscious and her primary motivation is simply to prove she is the equal of men.

Thus, while both works contain the idea of a daughter of Robin Hood who tries to prove herself the equal of men and who falls in love, each work expresses that idea in a different manner and seems to take a different path toward that end. Based on the above discussion, it is our view that the two works are not so substantially similar to conclude that the defendants used the sHerwood in producing the Princess of Thieves.

Our conclusion is bolstered by the findings of defendant's expert, Robert A. Gorman. Mr. Gorman's curriculum vitae includes teaching Copyright for over 37 years at the University of Pennsylvania and other law schools, has authored a Copyright casebook and a monograph on Copyright published by the Federal Judicial Center. After viewing videotapes of both sHerwood and Princess of Thieves and the written scripts of both works, Professor Gorman

concluded that “the overwhelming bulk, if not all, of the similarities, that exist between sHerwood and Princess are part of the public domain and may be freely copied.....” Expert Report of Robert A. Gorman at 2 (attached to defendants’ reply brief as Exhibit A.) It is further the opinion of Professor Gorman “that there is no character that has been originated by Mr. Daley and delineated in the necessary measure of detail to justify copyright protection. In any event, there is little or no overlap of characters and character development between sHerwood and Princess.” Id. at 3. Finally, with respect to the alleged similarities between Robyn and Gwyn, Professor Gorman states that “[a] teen-age daughter of Robin Hood, seeking to be accepted as a grown-up and the equal of her male peers, is properly understood as a character “idea” which different authors are permitted to elaborate in their own varying ways-in the characters’ behaviors, in their motivations, in their dialogue, in their relationships with other characters, and in the manner in which they carry forward the details of the plot. The ‘substantial similarity’ test allows for these differing ‘expressions’ of character ‘ideas,’ and I conclude that such is the case here, in the comparison of Robyn and Gwyn.” Id. at 4.

Plaintiff’s expert on the other hand is Bryan Scott who describes himself as an Emmy-award winning professional writer and television producer. Significantly, Mr. Scott does not state that he viewed the videotapes of the two works, but only that he read the scripts. He also does not compare the two works in terms of plot, incidents or characters, but only conclusory opines that “there is not doubt in my mind that the original concepts, which are under protection by copyright law, have been copied.” Expert Report of Bryan Scott at 2 (attached to Plaintiff’s Opposition Brief as Exhibit A.). He bases his conclusion largely on the fact that plaintiff’s work has an earlier copyright date and had been performed in public venues prior to

the formation of the script for defendants' work. As a result, we find the expert opinion of Robert Gorman to be much more persuasive than that of Bryan Scott.

For the foregoing reasons, judgment will be entered in favor of the defendants and against the plaintiff.

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ORDER

The motion of the defendants for judgment on the pleadings (Doc. #14) is converted to a motion for summary judgment.

The motion of the defendants for summary judgment (Doc. #14) is GRANTED.

Judgment is ENTERED in favor of the defendants and against the plaintiff.

IT IS SO ORDERED.

CHARLES R. WEINER

